86-883 (1)

No. -

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

NESCCO, INC.,
Petitioner and Real Party in Interest,
for and on behalf of Storage Spaces
Designated Nos. "8" and "49"
Located at 277 Douglas, Visalia California,
Defendant (C.A. No. 85-1085),

v.

UNITED STATES OF AMERICA,
Respondent and Plaintiff.

BALARAMA'S ENTERPRISES, INC.,
Petitioner and Real Party In Interest,
for and on behalf of 560 South Bridge Street,
Visalia, California, Defendant (C.A. No. 85-1086),

v.

UNITED STATES OF AMERICA,
Respondent and Plaintiff.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where an unattached affidavit for two search warrants refers to fifty-seven (57) different items, yet the search warrants list only fourteen (14) of these items with a generalized catchall provision which is overbroad on its face, can the catchall provision be upheld by the Ninth Circuit's freshly coined "implied limitation" rule of particularity whereby the otherwise overbroad provision is implicitly limited to items similar to the fourteen (14) listed items?

2. Do two search warrants which each authorize the seizure of "fruits and instrumentalities of crimes which are evidence of violation of, or in violation of, 21 U.S.C. 331(a) and (k)" comply with the Fourth Amendment requirement of partcularity?

3. Did the Ninth Circuit err in upholding the seizure of *forty-three (43)* different items by finding that the search warrant could not have been more particularized when the unattached affidavit referred to fifty-seven (57) different items yet only fourteen (14) of these items were named in the search warrant for seizure along with a generalized catchall provision which is overbroad on its face?

4. Were the two search warrants which authorized the seizure of "(a)ll other articles of drug" and all records pertaining to drugs, where "drug" is broadly defined by the applicable statute as "any article intended to affect the structure or any function of the body of man" (21 U.S.C. Section 321(g)(1)(C), sufficiently particularized so as to instruct the executing deputy U.S. Marshalls what could be seized and leave nothing to their discretion?

5. Did the executing deputies of the U.S. Marshall Service seize items and records which exceeded the scope of the generalized catchall provision contained in both warrants?

6. Does the "good-faith" exception of *United States v. Leon* (1984) ____ U.S. ____ 104 S.Ct. 3405, ____ L.Ed.2d apply to a search warrant catchall provision which is overbroad on its face?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioners, NESCCO, INC., real party in interest in C.A. No. 85-1085, and BALARAMA'S ENTERPRISES, INC., real party in interest in C.A. 85-1086. Respondent is the United States of America.

Each petitioner, NESCCO, INC. and BALARAMA'S ENTERPRISES, INC., respectively, has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	15
APPENDIX A	A-1
APPENDIX B	A-14

TABLE OF AUTHORITIES

Page

Supreme Court Cases:

Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930 (1967) 8

Coolidge v. New Hampshire, 403 U.S. 443, 481, 91 S.Ct. 2022, 2046, 29 L.Ed.2d 564 (1971) 12

Illinois v. Gates, 462 U.S. ____, ____, 105 S.Ct. 2317 ____, 76 L.Ed.2d 527 (1983) 8

Jones v. United States, 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958) 8

Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927) 7, 11, 14

Massachusetts v. Sheppard, __ U.S. ____, 104 S.Ct. 3424, 80 L.Ed.2d____, (1984) 8

Payton v. New York, 445 U.S. 573, ____, 100 S.Ct. 1371, ____, 63 L.Ed. 639 (1980) 7, 8

Stanford v. Texas, 379 U.S. 476, ____, 85 S.Ct. 506, ____, 13 L.Ed.2d 431 (1965) 8

Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) 8

Steele v. United States, 267 U.S. 498, 45 S.Ct. 414, 69 L.Ed. 757 (1925) 8

United States v. Leon, ____ U.S. ____, 1045 S.Ct. 3405, ____L.Ed.2d..... i, 14

Circuit Courts:

Guerra v. Sutton, 783 F.2d 1371 (9th Cir. 1986) 11

United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982) .. 9, 10

United States v. Christine, 687 F.2d 749 (3rd Cir. 1982) 11, 12, 13

United States v. Crozier, 674 F.2d 1293 (3rd Cir. 1982), vacated on other grounds, ____ U.S. ____, 104 S.Ct. 3575, 82 L.Ed.2d 873 (1984), on rehearing, 777 F.2d 1276 (9th Cir. 1985) 9, 14, 15

TABLE OF AUTHORITIES

Page

United States v. Gardner, 537 F.2d 861 (6th Cir. 1976) ... 9

United States v. Gomez-Soto, 723 F.2d 649 (9th Cir. 1984) 9, 15

United States v. Hillyard, 677 F.2d 1336 (9th Cir. 1982) 10, 13

United States v. Klein, 565 F.2d 183 (1st Cir. 1977) 9, 13

United States v. LeBron, 729 F.2d 533 (8th Cir. 1984) ... 9

United States v. Marti, 421 F.2d 1263 (CA2 1970) 9

United States v. Offices Known as Fifty-State Distributing Company, 708 F.2d 1371 (9th Cir. 1983), cert. denied, 465 U.S. 1021, 104 S.Ct. 1272, 79 L.Ed.2d 677 (1984) 13

United States v. Roche, 614 F.2d 6, 8 (1st Cir. 1980) 9

United States v. Washington, 782 F.2d 807 (9th Cir. 1986) 13, 15

United States v. Whitten, 706 F.2d 1000 (9th Cir. 1983), Cert. denied, 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d (1984) 9

Voss v. Bergsgaard, 774 F.2d 402 (10th Cir. 1985) 9

State Court:

Aday v. Superior Court of Alameda County, 55 Cal.2d 789, 13 Cal.Rptr. 415, 362 P.2d 47 (1961) 12

Constitution

Fourth Amendment 3

Statutes and Rules

Federal Rules of Criminal Procedure, Rule 41(c)(1) 3

21 U.S.C.:

§ 321(g)(1)(C) 3, 6, 11

§ 331(a) and (k) 4, 6, 10

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NESCCO, INC.,
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Located at 277 East Douglas, Visalia, California,
Defendant (C.A. No. 85-1085),

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v.

UNITED STATES OF AMERICA,
Respondent and Plaintiff.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, being real parties in interest NESCCO, INC. ("NESCCO") in No. 85-1085 and BALARAMA'S ENTERPRISES, INC. ("BALARAMAS") in No. 85-1086, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered December 3, 1985, Rehearing and Suggestion for Rehearing En Banc denied August 27, 1986.

OPINIONS BELOW

Ninth Circuit: The opinion of the Court of Appeals for the Ninth Circuit is reported at 777 F.2d 1363 (9th Cir. 1985), and is reprinted in the Appendix hereto, *infra.*

District Court: The memorandum decision of the United States District Court of the Eastern District of California (Coyle, D.J.) has not been reported. The decision is included in the Excerpt of Clerk's Record to be certified and placed on file with this Court from the United States Court of Appeal for the Ninth Circuit.

JURISDICTION

Invoking federal jurisdiction under Federal Rules of Criminal Procedure (Fed R. Crim. P.) Rule 41(e) and (f) for an order for the return of property unlawfully seized at storage lockers designated as Numbers "8" and "49" located at Rent-A-Space, 727 East Douglas, Visalia, California (CR Mag.Dkt.No. 84-2306) and at Balarama's Enterprises, Inc., 650 South Bridge Street, Visalia, California (CR Mag.Dkt.No. 84-2307), the petitioners and real parties in interest on November 30, 1984 filed their respective civil Motion for Return of Property and Motion to Suppress in the Eastern District of California (Fresno Division). The two respective search warrants were executed on November 7, 1984. On March 11, 1985, the Eastern District (Coyle, D. J.) denied the petitioners' Motions for Return of Property and Motions to Suppress.

No criminal charges have ever been filed and the Government acknowledged at argument that no indictment is pending before the grand jury.

On petitioners' appeals, the Ninth Circuit on December 3, 1985, entered an opinion affirming the Eastern District's orders denying petitioners' motions for return of property. Petition for Rehearing and Suggestion for Rehearing En Banc was mailed on December 20, 1985 and lodged with the court on December 23, 1985. Petitioners' Motion For Late Filing of a Petiton for Rehearing and Suggestion for Rehearing En Banc, with attached decla-

ration of counsel, was under consideration from December 26, 1985 and granted on July 30, 1986. Appellants' Petitioner for Rehearing and Suggestion for Rehearing En Banc was denied on August 27, 1986.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1). A joint Petition for Writ of Certiorari is filed by petitioners and real parties in interest pursuant to U. S. Supreme Court Rules, Rule 19.4.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Federal Rules of Criminal Procedure, Rule 41(c)(1) provides in pertinent part as follows:

> "If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or persons to be seized and naming or describing the person or place to be searched."

Title 21, United States Code, Sections 321(g)(1)(C):

> (g)(1) "The term drug' means (A) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended

to affect the structure or any function of the body of man or other animals; . . . ."

Title 21, United States Code, Sections 331(a) and (k):

"The following acts and the causing thereof are prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded".

STATEMENT OF THE CASE

On November 6, 1984, Investigator Robert J. Anderson of the United States Food and Drug Administration ("FDA") sought the two search warrants, utilizing an identical 16-page Affidavit of Robert J. Anderson. The first Affidavit for Search Warrant requested a warrant to search two storage spaces designated Nos. 8 and 49 located at 727 East Douglas, Visalia, California (CR Mag.Dkt. No. 84-2306REC). The two storage spaces were leased by Petitioner and Real Party in Interest, NESCCO, INC.

At the same appearance, the second Affidavit for Search Warrant requested a warrant to search 650 South Bridge Street, Visalia, California (CR Mag.Dkt. No. 84-2307REC), the business premises of Petitioner and Real Party in Interest, BALARAMA'S ENTERPRISES, INC. The search warrant for the two storage spaces and 650 South Bridge Street both designated the identical fifteen (15) listed items for seizure. In particular, item 15 authorized the seizure at the respective locations the following:

"(15) All other articles of drug (which include components of drugs); labeling for drugs; orders for drugs received in the mail and any checks or money orders contained

> therein; records of orders for drugs received by telephone; receiving and shipping records for drugs and drug materials; all other records, including telephone records and computerized records, which may reflect the purchasing, ordering, sale, repacking, distribution, or other disposition of drugs; checks from U.P.S. for C.O.D. shipments of drugs; personal or business correspondence relating to the purchasing, ordering, sale, repacking, distribution, or other disposition of drugs; and other fruits and instrumentalities of crimes which are evidence of violations of, or in violation of, 21 U.S.C. 331(a) and (k)."

Neither the Affidavit for Search Warrant nor the Affidavit of Robert J. Anderson was incorporated into, attached to, or otherwise accompanied either search warrant issued on November 6, 1984. (See Opinion, 777 F.2d at 1368, Appendix, *infra.*)

Both search warrants were served and executed by deputies of the United States Marshal Service on November 7, 1984. The written returns on both search warrants were filed with the court on November 20, 1984. On November 30, 1984 Petitioners and Real Parties in Interest filed a joint Motion for Return of Property and Motion to Suppress. On December 5, 1984, Respondent filed its Answer in Opposition to the Motion for Suppression and Return of Property.

Petitioners' joint Motion for Return of Property was heard on December 10, 1984, before the Honorable Robert E. Coyle, United States District Judge, Eastern District of California. On March 11, 1985 the court filed its order denying Petitioners' joint Motion for Return of Property and to Suppress Evidence. The Order was served by mail on March 13, 1985. On March 20, 1985, Petitioner NESCCO, INC. filed its Notice of Appeal. On March 21, 1985, Petitioner BALARAMA'S ENTERPRISES, INC. filed its Notice of Appeal.

The joint appeal to the Ninth Circuit Court of Appeal was argued and submitted on September 11, 1985. The Opinion (see Appendix, *infra.*) was filed on December 3, 1985 and received on December 9, 1985. Petitioners' joint Petition for Rehearing and Suggestion for Rehearing En Banc was submitted on Decem-

ber 20, 1985 by mail and filed on July 30, 1986. The joint Petition for Rehearing and Suggestion for Rehearing En Banc was denied and the Suggestion for Rehearing En Banc was rejected by order filed August 27, 1986.

In its Opinion the Ninth Circuit acknowledged that the question of whether item 15 is sufficiently particularized is a "close one." (*Storage Spaces, supra,* 777 F.2d at 1369, 1370.) Item 15 authorized the seizure of "all other drugs, labels for drugs, orders and checks for drugs, records and correspondence relating to purchases, sales, packing and distribution of drugs; and other fruits and instrumentalities of crimes *which are evidence of violation of, or in violation of, 21 U.S.C. Sections 331(a) and (k).*" (*Id.* at 1369, emphasis supplied.) The Ninth Circuit correctly noted that item 15 was meant to cover other drugs (and labeling and paperwork relating to them) not mentioned in items 1-14, and that the statutory limitation (21 U.S.C. Sections 331(a) and (k)) did not provide a sufficient guideline to assist the executing officers in distinguishing other appropriate drugs from irrelevant material. (*Id.,* 777 F.2d at 1369-1370). The Ninth Circuit also found that "(o)ther than the statutory limitation, the only express limit on the scope of the search is that the seized material have some connection with drugs. This is obviously not a significant limitation because the statute itself already encompasses that limitation. See 21 U.S.C. Section 352." (*Id.,* at 1369; see also 21 U.S.C. Section 321(g)(1)(C) which defines the term "drug" as including "articles (other than food) intended to affect the structure or any function of the body of man.")

However, in spite of finding that item 15, *supra,* was "overbroad" on its face measured by prior precedent (*Id.* at 1369-1370), the Ninth Circuit upheld item 15 as sufficiently particularized by Fourth Amendment constitutional standards by its freshly coined "implied limitation" standard of particularity whereby the otherwise unbounded reference to all other drugs (and labeling and paperwork relating to drugs) is "implicitly limited to only those drugs with names of the same nature as those identified in items 1-14" and that "a much more precise description could not have been given." (*Id.* at 1380.)

The Ninth Circuit's "implied limitation" rule of particularity was formulated to uphold an otherwise and admittedly "overbroad" request on a record which establishes that even though the unattached Affidavit of Inspector Anderson named fifty-seven (57) different items, *only* fourteen (14) were specified in items 1-14. In spite of the record before the Court, and in conflict with prior precedent, the Ninth Circuit affirmed the District Court's Order denying Petitioners' Joint Motion for Return of Property.

REASONS FOR GRANTING THE WRIT

I

The Ninth Circuit's freshly coined "implied limitation" rule of particularity to uphold an admittedly overbroad catchall search warrant provision conflicts with decisions of this Court, the Ninth and other Circuits.

Without citation of authority, the Ninth Circuit has freshly coined a novel standard by which to measure the sufficiency of constitutionally mandated particularity of a search warrant referred to as the "implied limitation" rule. By adoption of its implied limitation rule of particularity, the Ninth Circuit has given itself discretionary interpretive power of the Constitution's Fourth Amendment requirement of particularity to uphold an otherwise admittedly overbroad catchall search warrant provision.

The Ninth Circuit's creation of such an "implied limitation" rule of Constitutional sufficiency of search warrant particularization directly conflicts with this Court's longstanding precedent of *Marron v. United States,* 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927), wherein this Court held:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is taken, nothing is left to the discretion of the officer executing the warrant."

It was fear of general warrants and indiscriminate rummaging among personal belongings which motivated the adoption of the Fourth Amendment. (*Payton v. New York,* 445 U.S. 573, 583,

100 S.Ct. 1371, 1378, 63 L.Ed. 639 (1980). Similarly, in *Steele v. United States,* 267 U.S. 498, 503, 504, 45 S.Ct. 414, 416, 69 L.Ed. 757 (1925), this Court held that the "description of the place to be searched must be sufficiently particularized to enable the executing officers to ascertain and identify it with reasonable effort".

This Court has uniformly applied the rule that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. *Stanford v. Texas,* 379 U.S. 476, 486, 85 S.Ct. 506, 512, 13 L.Ed.2d 431 (1965); see *Massachusetts v. Sheppard,* ____ U.S. ____, 104 S.Ct. 3424, 2428 n.5, 80 L.Ed. ____, (1984). (See also *Camara v. Municipal Court,* 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930 (1967); *Steagald v. United States,* 451 U.S. 204, 211-212, 101 S.Ct. 1642, 1647, 68 L.Ed.2d 38 (1981); *Jones v. United States,* 357 U.S. 493, 499, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958).)

The factual situation presented in the case at bar is not one where the warrants which lacked sufficient particularity as to the generalized, catchall item 15 could be cured by the supporting affidavit because the affidavit was not incorporated into either search warrant by reference, nor did the affidavit accompany either warrant. (See *Massachusetts v. Sheppard, supra,* ____ U.S. at ____, 104 S.Ct. at 3429, n.7, dictum.) Rather, because item 15 was so overbroad on its face and because there is no indication that Anderson's affidavit was attached to or otherwise accompanied either search warrant (Opinion, 777 F.2d at 1368; Appendix, *infra.*), and absent the Ninth Circuit's "implied limitation" rule to supply particularity where none exists, it is plainly evident that the magistrate should not have issued the search warrants as to item 15's generalized and unfettered discretionary authorization to seize any article or record thought to pertain to *any* "drug". (See *Illinois v. Gates,* 462 U.S. ____, 105 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983).)

The Ninth Circuit's freshly coined "implied limitation" rule of particularity also conflicts with several of its own decisions as well as decisions of several other circuits. As the Ninth Circuit noted in its Opinion, the description in item 15 included "practically all

paperwork (records, orders, checks, correspondence) relating to drugs, all drugs and labels for drugs, and other fruits and instrumentalities of crimes, the only explicit limitation being that the material be evidence of a violation of 21 U.S.C. Section 331(a) and (k)." (Opinion, 777 F.2d at 1369, Appendix, *infra.*)

In previous decisions, the Ninth Circuit had stated that " 'limiting' the search to only records that are evidence of the violation of a certain statute is generally not enough." *United States v. Cardwell,* 680 F.2d 75, 78 (1982) (books and records of violations of tax evasion, 26 U.S.C. Section 7201 insufficiently particular); *United States v. Crozier,* 674 F.2d 1293 1299 (1982), vacated on other grounds, ____ U.S. ____, 104 S.Ct. 3575, 82 L.Ed.2d 873 (1984) on rehearing 777 F.2d 1376, 1380-1382 (1985) (warrant which authorized the seizure of "material evidence of violation of 21 U.S.C. Section 841", prohibiting the manufacture and possession of amphetamine with intent to distribute, was not sufficiently particularized); *United States v. Whitten,* 706 F.2d 1000, 1014 (1983), *cert. denied* 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d (1984), (warrant authorizing search for "evidence of narcotics trafficking" is overbroad) *United States v. Gomez-Soto,* 723 F.2d 649, 654, *cert. denied,* ____ U.S. ____, 104 S. Ct. 2360, 80 L.Ed.2d 831 (1984) (portion authorizing seizure of papers, including currency, evidencing failures to file currency transaction reports as required by Title 31 U.S.C. is unconstitutionally vague). Other circuits have applied the same standards in holding search warrants unconstitutional for failure to conform to the particularity requirement of the Fourth Amendment. See *United States v. Klein,* 565 F.2d 183, 185 (1st Cir. 1977); *United States v. Roche,* 614 F.2d 6, 8 (1st Cir. 1980); *United States v. Marti,* 421 F.2d 1263, 1268-1269 (2nd Cir. 1970); *United States v. Gardner,* 537 F.2d 861, 862 (6th Cir. 1976); *United States v. LeBron,* 729 F.2d 533, 536-537 (8th Cir. 1984); and *Voss v. Bergsgaard,* 774 F.2d 402, 406 (10th Cir. 1985).

Thus, the Ninth Circuit's "implied limitation" rule of particularity affects a rule of Constitutional importance and national application in which there is an overriding need of uniformity as to Constitutional standards of particularity.

II

The two search warrants which authorize the seizure of "fruits and instrumentalities of crimes which are evidence of violation of, or in violation of, 21 U.S.C. Section 331(a) and (k)" fail to comply with the Fourth Amendment requirement of particularity.

Although the Ninth Circuit had previously held that " 'limiting' the search to only records that are evidence of the violation of a certain statute is generally not enough" (*Cardwell, supra,* 680 F.2d at 78), in the cases at bar, the Ninth Circuit upheld the generalized catchall provision which authorized the seizure of all other articles of drugs; labeling for drugs; orders for drugs; records of orders for drugs; receiving and shipping records for drugs; all other records which may reflect purchasing, ordering, sale, repacking, distribution, or other disposition of drugs; checks for C.O.D. shipments of drugs; personal or business correspondence relating to drugs; and "other fruits and instrumentalities of crimes which are evidence of violations of, or in violation of, 21 U.S.C. 331(a) and (k)".

The issue presented with regard to the generalized catch-all provison number 15 in both search warrants is whether such provision provided any "articulated standards for the executing officers to distinguish between the property legally possessed and that which is not." (See *United States v. Hillyard*, 677 F.2d 1336, 1339 (9th Cir. 1982). What standards were provided in the two search warrants to permit the executing officers to determine what items fell within the broad catch-all provision, other than the general references to violations of 21 U.S.C. 331 (a) and (k)? As the 9th Circuit correctly found, it is clear that neither the Affidavit for Search Warrant nor the Affidavit of Investigator Anderson could be used to provide such guidance or standard in that neither was incorporated into, attached to, or otherwise accompanied either search warrant. (See Opinion, 777 F.2d at 1368, Appendix, infra.)

The applicable provisions of Title 21, U.S. Code Section 331 provide as follows:

> "The following acts and causing thereof are prohibited:
>
> (a) the introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded . . . . (k) the alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

Title 21, U.S. Code Section 321 (g)(1) defines the term "drug" in part as follows: "(C) articles (other than food) and intended to affect the structure or any function of the body of man or other animals." Given the breadth of articles which could be deemed a "drug" as defined above, the Fourth Amendment standard of particularity mandated that the warrant particularly describe the items to be seized and not leave anything to the discretion of the executing officers. (See *Marron, supra,* 275 U.S. at 196, 48 S.Ct. at 76.) In the case at bar, not only did the executing officers not have the benefit of any affidavit in support of the warrant, but given the breadth of the applicable statute, even reference to the statute itself would not have been helpful. There was no showing by the government that there had been any briefing of the executing officers of what was to be seized or not seized, nor was there any fulfillment of a duty to inquire as to the nature and scope of the warrant, or the means by which the executing officers were to confine their activities to the precise scope of the warrant. (See *Guerra v. Sutton,* 783 F.2d 1371, 1375 (9th Cir. 1975).)

Rather, by approving the executing officers' "unbridled descretion" through the Ninth Circuit's adoption of the "implied limitation" rule, the Ninth Circuit has condoned the danger created to constitutional Fourth Amendment Rights whereby "warrants might be obtained which are essentially general in character, but as to minor items meet the requirement of particularity, and that wholesale seizures might be made under them, in the expectation that the seizure would in any event be upheld as to the properties specified. Such an abuse of the warrant procedure, of course, could not be tolerated". (See *United States v.*

Christine, 687 F.2d 749, 754 (3rd Circuit 1982) citing *Aday v. Superior Court of Alameda County*, 55 Cal.2d 789, 13 Cal.Rptr. 415, 362 P.2d 47, 53 (1961).

III

The Ninth Circuit's adoption of the implied limitation rule of particularity unnecessarily encourages general warrants.

In upholding the generalized catch-all item 15 of both warrants, the Ninth Circuit found on the basis of the record before it, that "it is doubtful, however, that a much more precise description could have been given". (See opinion, 777 F.2d at 1370, Appendix, infra.)

The Warrant Clause of the Fourth Amendment, including the requirement of particularity, however, is not "an inconvenience to be somehow weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakingly overzealous executing officers who are part of any system of law enforcement." *Coolidge v. New Hampshire*, 403 U.S. 443, 481, 91 S.Ct. 2022, 2046, 29 L.Ed.2d 564 (1971).

Based upon the record before the Ninth Circuit, its finding that neither search warrant nor the generalized catch-all provision could not have been more particularized is clearly erroneous. The affidavit of Robert J. Anderson in support of both affidavits for search warrant named and referred to 57 different product items, yet only 14 of these items were particularized and named in either search warrant for seizure. With the exception of "unlabled white powder", the executing officers seized 43 different items which had been referred to in the unattached affidavit of Investigator Anderson but which had not been at all particularized in the warrant.

The record does not support whatsoever any contention, nor has the government sought to argue, that the subject search warrants authorized the executing officers to seize *all* of the products and records encountered, whereby the issuing magistrate determined

what was to be seized, such as when the alleged crime "permeated the entire busniess operation" and it would not be "possible through more particular description to segregate those business records [and products] that would be evidence" of crime, from those that are not. (See *United States v. Washington, supra,* 782 F.2d at 819, citing *United States v. Offices Known as Fifty-State Distributing Company,* 708 F.2d 1371, 1374 (9th Cir. 1983), cert. denied, 465 U.S. 1021, 104 S.Ct. 1272, 79 L.Ed.2d 677 (1984); See also *United States v. Christine, supra,* 687 F.2d at 753.)

Although when there is probable cause to believe that the premises to be searched contained a class of generic items and goods for which there is probable cause to search for a portion thereof, a search warrant may direct inspection of the entire class or all of the goods "if there are objective articulated standards for the executing officers to distinguish between property legally possessed and that which is not". *United States v. Hillyard, supra,* 677 F.2d 1336, 1340 (9th Cir. 1982), citing *United States v. Klein,* 565 F.2d at 188 (1st Cir. 1977). In the case at bar, no specific, objective, or articulated standards were stated in either warrant nor provided to the executing officers. In the face of the Fourth Amendment requirement of particularity, however, the Ninth Circuit has upheld the "unfettered discretion" of the executing officers by a post-search "implied limitation" interpretation of the generalized provision.

The Ninth Circuit adopted its "implied limitation" rule of particularity by finding that the catch-all generalized provision of what was to be seized under item 15 of both search warrants" to only those drugs with names of the same nature of those identified in items 1-14". (Opinion, 777 F.2d at 1370; Appendix, infra.) If in fact the two search warrants are to be deemed "implicitly limited" as stated by the Ninth Circuit, there was no justification for seizure of Lactose, Quinine, Caffeine Anhydrous, Mannitol, Roxanthin Red, Ephedrine Sulfate, Ephedrine Hydrochloride, and Vitamin B Complex, Super Diet Aid, hot boxes, or carved boxes. Furthermore, the extent to which the generalized catch-all item 15 provision contained in both warrants permitted an "unfettered" seizure of records without limitation is amply demon-

strated by the search warrant return listing the records which were seized.

The seizure of many duplicate records, and of many irrelevant records, confirms the unbridled discretion afforded the executing deputy marshals in seizing the records of so-called drugs. See *United States v. Crozier, supra,* 674 F.2d at 1298.) A mere review of a good portion of the items and records seized readily reveals that the seizure of these items was not limited to the fourteen specifically stated items or "drugs with names of the same nature as those identified in items 1-14" as suggested by the opinion of the Ninth Circuit. If the government sought seizure of any of the products or records pertaining to such products which were referred to in the affidavit in support of the search warrant, but not listed or particularized in the two search warrants, the government could have, and should have listed such items specifically, so as not to leave the discretion as to what was to be seized with the executing officers, but with the issuing Magistrate. (See *Marron, supra,* 275 U.S. at 196, 48 S.Ct. at 76.)

IV

The "good faith" exception of *United States v. Leon* (1984), ___ U.S. ___, 104 S. Ct. 3405, ___ L.Ed. ___ should not apply so as to uphold any seizure pursuant to a search warrant catch-all provision which is overbroad on its face.

But for the adoption of the Ninth Circuit's implied limitation interpretation of the catch-all generalized item 15 on both search warrants, the Ninth Circuit acknowledged that item 15 was "otherwise overbroad". (Opinion, 777 F.2d at 1370; Appendix, infra.) It is submitted without the Ninth Circuit's adoption of the so-called implied limitation particularity rule, that the generalized item 15 of both search warrants was "so facially deficient, i.e., in failing to particularize the place to be searched or *things to be seized*—that the executing officers cannot reasonably presume it to be valid." *U.S. v. Leon* ___ U.S. ___, 104 S.Ct. 3405, 3422, 82 L.Ed.2d 677 (1984). Therefore, any seizure of items or products, and all records seized pursuant to the generalized item 15 of both warrants should have been suppressed as seizures pursuant to an authorization which was overbroad on its face.

(See *Leon, Id.*) Rather, to the extent that probable cause was shown with respect to the first 14 listed items in both search warrants, seizure of such items could have been upheld as seized pursuant to valid portions of the search warrant, whereas the balance of seized items and records should have been suppressed. (*Gomez-Soto, supra,* 723 F.2d at 654; *Cardwell, supra,* 680 F.2d at 78; and *Washington, supra,* 782 F.2d 819.)

CONCLUSION

For these various reasons, the Petition for Certiorari should be granted. If the Petitioners are correct in urging that any seizure pursuant to the generalized catch-all provision of item 15 in both search warrants was unconstitutional, the matter should be remanded to the District Court for appropriate disposition and determination so as to segregate articles and records seized pursuant to any valid portion of the search warrants from those articles and records seized pursuant to the unconstitutional portions.

Respectfully submitted,

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and
DAVID F. RODRIGUEZ
Counsel for Petitioners

Appendix A

United States of America,

Plaintiff-Appellee,

v.

Storage Spaces Designated Nos. "8" and "49"
Located at 277 East Douglas, Visalia, Calif., Defendant,

and

Nescco, Inc., Real Party in Interest-Appellant.

United States of America,

Plaintiff-Appellee,

v.

560 South Bridge Street, Visalia, California,

Defendant,

and

Balarama's Enterprises, Inc., Real Party in Interest-Appellant.

Nos. 85-1085, 85-1086.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 11, 1985.

Decided Dec. 3, 1985.

Before CHOY, Senior Circuit Judge, HUG and SCHROEDER, Circuit Judges.

CHOY, Senior Circuit Judge:

Food and Drug Administration ("FDA") Inspector Anderson presented to a magistrate two identical 16-page affidavits relating information he had derived from his investigation of appellants Balarama's Enterprises, Inc. ("Balarama's") and NESCCO, INC. ("NESCCO"). The magistrate issued two search warrants, one for Balarama's main office at 650 South Bridge St., Visalia, California, and the other for NESCCO's leased storage spaces, numbers 8 and 49, at 727 East Douglas, Visalia, California.

Both warrants designated the same fifteen items to be seized, including fourteen different allegedly misbranded drugs, each having a different commercial name. The fifteenth item was a catchall provision seeking all other drugs, labeling for drugs, paperwork relating to drugs (orders, records, checks and correspondence), and other articles evidencing violations of 21 U.S.C. § 331(a) & (k). This statute, in general, prohibits the misbranding of drugs that have been or will be in interstate commerce.[1]

The search warrants were executed and a substantial quantity of drug material and documents was seized. Appellants jointly filed a motion for return of property and suppression of evidence, contending that there was no probable cause to support the warrants and that item 15 of the warrants was overbroad. Stating that the request for suppression was premature because no criminal proceedings were pending against appellants, the district court rejected appellants' motion for return of property by upholding the validity of the search warrants. Both appellants timely filed a notice of appeal from this decision and their appeals were consolidated.

ISSUES

(1) Is the district court's denial of appellants' motion for return of property and suppression appealable?

(2) Was there probable cause to support the issuance of the two search warrants?

(3) Did the search warrants describe the items to be seized with sufficient particularity?

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[1] 21 U.S.C. § 331 provides;

"The following acts and the causing thereof are prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is . . . misbranded.

(k) . . . the doing of any . . . act with respect to, a . . . drug . . . , if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being . . . misbranded.

(1) Appealability of Denial of Motion for return of Property and Suppression

We must first consider the jurisdictional question of whether the district court's order denying appellants' motion is a final decision.[2]

In *DiBella v. United States*, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962), the Supreme Court declared that a denial of motion to suppress is appealable "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." *Id.* at 131-32, 82 S.Ct. at 660. The Supreme Court identified those instances when an order granting or denying a motion for suppression of evidence is interlocutory:

> When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment—in each such case the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof." *Cogen v. United States*, 278 U.S. 221, 227, 49 S.Ct. 118, 120, 73 L.Ed. 275.

DiBella, 369 U.S. at 131, 82 S.Ct. at 660.

In interpreting the *DiBella* rule, this court has been consistent in its treatment of appeals seeking review of orders granting or denying motions that seek the return of property: if there is a criminal proceeding pending, this court lacks jurisdiction because the order is interlocutory, *United States v. Woodson*, 490 F.2d 1282, 1283 (9th Cir.1973); *Meir v. Keller*, 521 F.2d 548, 556 (9th Cir.1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1410, 47 L.Ed.2d 348 (1976); if there is no criminal prosecution pending against the movant, the order on the motion for the return of property is final and, hence, appealable. *VonderAhe v. Howland*, 508 F.2d

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[2] The government purported to concede jurisdiction at oral argument. Since subject-matter jurisdiction cannot be conceded, *see Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982), however, we address that issue here.

364, 368 (9th Cir. 1974); *Goodman v. United States*, 369 F.2d 166, 168 (9th Cir.1966). Although the discussion in *Woodson* and *Meir* appears to place some stress on the fact that the motion sought suppression as well as return of property, in both cases, a criminal action was pending. The *VonderAhe* opinion makes it plain that it is the pendency of the criminal action that is the determining factor, not the form of the motion, which is in accord with the earlier *Goodman* opinion. This is also in accord with the Supreme Court's statement in *United States v. Ryan*, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971). There, the Court, in reference to *DiBella*, stated:

> We have thus indicated that review is available immediately of a denial of a motion for the return of seized property, where there is no criminal prosecution pending against the movant.

Here, there is no criminal proceeding pending. In fact, the district court noted that because no criminal proceedings were *in esse*, it would not consider appellants' motion as one to suppress. As such, the district court was confronted solely with a motion for the return of property. As there was no criminal prosecution pending, we have jurisdiction to review the district court's order denying appellants' motion for the return of property.

(2) Probable Cause to Support Issuance of Warrants

The standard for review of a magistrate's probable cause determination is whether the magistrate "had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing." *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697 (1960)). There are essentially two elements involved: evidence that a crime has occurred, and evidence that the place to be searched contains evidence of that crime. *See United States v. Federbush*, 625 F.2d 246, 252 (9th Cir.1980). A magistrate's finding of probable cause should be given "substantial deference." *United States v. Flores*, 679 F.2d 173, 176 (9th Cir.1982), *cert. denied*, 459 U.S. 1148, 103 S.Ct. 791, 74 L.Ed.2d 996 (1983).

(A) Evidence of Violations of § 331(a) & (k)

Inspector Anderson's affidavit provides ample evidence that appellants had violated 21 U.S.C. § 331(a) & (k).[3] In this case, there are three relevant components to such violations, each having been attacked by appellants. 1) The articles must be drugs. 21 U.S.C. § 352. 2) The drugs must be misbranded; that is, they must meet one of the numerous § 352 definitions of misbranded. 3) And they must be sufficiently connected to interstate commerce. 21 U.S.C. § 331(a) & (k).

(i) The Articles are Drugs

The term "drug" includes "articles (other than food) intended to affect the structure or any function of the body of man." 21 U.S.C. § 321(g)(1)(C) (1982).[4] The vendor's intent is the key element in this statutory definition. *Cf. National Nutritional Foods Ass'n v. Mathews*, 557 F.2d 325, 333 (2d Cir.1977). This intent may be derived or inferred from labeling, promotional material, advertising, or any other relevant source. *Id.* at 334.

Anderson's affidavit strongly indicates that appellants promoted and intended their products to be used as cocaine substitutes. The general manager of Balarama's had admitted to Anderson in 1982 that the firm sold cocaine substitutes. In June of 1983, the State of California enjoined Balarama's from manufacturing, packaging, marketing, selling or distributing Benzocaine, Lidocaine, Tetracaine, and Procaine, anesthetic drugs often diverted to illegal use as cocaine substitutes.

Upon his arrest for possession of cocaine, William Bowes, an employee of Balarama's, was found with approximately 2000 leaflets entitled "Cocaine," each stating that the product advertised was a synthetic and was selling for 25% off the street price. The flyer contained directions for mailing an order to Balarama's.

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[3] Contrary to appellants' assertion, both Affidavits for Search Warrants did incorporate Inspector Anderson's affidavit.

[4] Appellants' contention that the § 321(g)(1) definition of "drug" involves a conjunctive test is frivolous.

The items seized, listed in Balarama's catalogs and advertisements as incense, had commercial names which suggest to persons interested in using cocaine or cocaine substitutes that the items are similar to or related to cocaine. Anderson's affidavit also quoted a medical journal article noting that cocaine substitutes are often promoted as incense. Some of the products were labeled with the words "if ingested or inhaled, may cause stimulation," which suggests that the products could produce stimulation, as cocaine does.[5]

Dr. Tocus, Chief of the Drug Abuse Staff of the FDA's Center for Drugs and Biologics for the last decade, and expert advisor to numerous federal and state governmental entities dealing with drug abuse, was quoted in Anderson's affidavit as saying that the various "incense" products distributed by Balarama's contain drug ingredients and are labeled, promoted, and distributed in a manner which suggests that they are intended by Balarama's to be used as drugs within the meaning of 21 U.S.C. § 321(g)(1).[6]

The various items of evidence strongly suggest that appellants were distributing "drug" within the meaning of § 321(g)(1)(C).

(ii) The Drugs were Misbranded

A drug is misbranded under 21 U.S.C. § 352(f)(1) if its label lacks adequate directions for use. The items seized contained no directions at all regarding how to use them as drugs.[7] They thus

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[5] The fact that the items were called "incense" and advertised as "Not for drug use" cannot be controlling on the issue of whether they are drugs. Where, as here, the items are otherwise promoted and advertised in ways that suggest they are cocaine substitutes, appellants' intent in distributing the products is clear. Self-serving labels cannot be allowed to mask the vendor's true intent as indicated by the overall circumstances. *See National Nutritional Foods*, 557 F.2d at 334.

[6] Thus, contrary to appellants' assertion, the government does not rely on evidence of consumer use alone to establish the appellants' intended use. Instead, the government relies primarily on the manner in which the products are promoted and advertised.

[7] This is probably partly a result of their being advertised as "incense" and "Not for drug use." However, if, as we concluded above, the items

clearly fail to provide the required "directions under which the layman can use a drug safely and for the purposes for which it is intended." 21 CFR § 201.5 (1985). Even if they are prescription drugs, they do not meet the regulatory prerequisites, under 21 CFR § 210.100, for exemption from the requirements that labels bear adequate directions for use.[8]

A drug is also misbranded if "its labeling is false or misleading in any particular." 21 U.S.C. § 352(a). Because the products are labeled as "incense," when it appears that they are in fact, intended for drug use, there is a reasonable basis for believing that the labeling is false and misleading.

Finally, a drug is misbranded if it contains two or more ingredients and the label fails to contain the name of each active ingredient. 21 U.S.C. § 352(e)(1)(A)(ii). Some of appellants' products contain more than one ingredient (e.g. Pseudo-Scent), yet their labels fail to identify all active ingredients.[9]

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are *intended* to be used as drugs, § 352(f)(1) requires that they contain adequate directions for use as drugs.

[8] Appellants' reliance on *United States v. Evers*, 643 F.2d 1043 (5th Cir.1981), is misplaced. *Evers* merely held that a doctor could not be guilty of failing to provide his patients with adequate directions for use of prescription drugs, because prescription drugs, by definition, can only be used under a physician's supervision; thus, it is impossible to provide adequate directions to laymen regarding the use of prescription drugs. 643 F.2d at 1050-51. Because appellants are not physicians distributing their products to their patients, *Evers* is inapplicable.

[9] The government also contends that the products are misbranded in that they are "imitation[s] of another drug." 21 U.S.C. § 352(i)(2). Although we need not resolve this issue in light of the sufficiency of the other misbranding violations already discussed, we find the government's contention to be questionable. The intent of § 352(i)(2) is to prevent drug distributors from "passing an imitation off as the original." *United States v. Generix Drug Corp.*, 460 U.S. 453, 459 n. 9, 103 S.Ct. 1298, 1302 n. 9, 75 L.Ed.2d 198 (1983). Although there is strong evidence that appellants' products are being offered as cocaine *substitutes, see supra,* there is little evidence that appellants are trying to pass their products off as cocaine, itself. There is not deception involved for it

(iii) Interstate Nexus

Agent Piekarski of the FDA's Reno, Nevada post placed orders with Balarama's for some of the suspected cocaine-substitute drugs. Balarama's shipped some of those products to Piekarski via United Parcel Service from Balarama's California address to Nevada. Such interstate shipments clearly meet the "introduction . . . into interstate commerce" requirements. 21 U.S.C. § 331(a).

In addition, during an FDA inspection of an Indiana company that apparently was repacking drugs for sale as cocaine substitutes, inspectors found a bottle of Lidocaine bearing the name Northeast Siberian Chemical Company (a/k/a NESCCO). The operator of the company said the order for the Lidocaine was placed with Balarama's in California.

The evidence supports the conclusion that Balarama's marketed and distributed many of their misbranded products out of state.

(B) Evidence that Items Sought by Search Warrant would Likely be Found at Balarama's Main Facility and in NESCCO's Leased Storage Spaces

We have ruled that the affidavit must only "enable the magistrate to conclude that it would be reasonable to seek the evidence in the place indicated by the affidavit." *United States v. Hendershot,* 614 F.2d 648, 654 (9th Cir.1980) (a stricter "more-likely-than-not" standard is not proper).

We need not resort to the evidence uncovered by Agent Anderson's pre-search inspection of NESCCO's leased storage spaces (mentioned in Anderson's affidavit) to conclude that it was very reasonable to seek the incriminating items at Balarama's' main facility at 650 South Bridge Street and at NESCCO's leased storage spaces at 727 East Douglas. Therefore, we need not resolve the issue of whether or not the

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appears that appellants are trying to pass their products off for exactly what they are, cocaine *substitutes.*

inspection was conducted in conformity with 21 U.S.C. § 374 and the fourth amendment.[10]

As discussed above, the Anderson affidavit contains abundant evidence suggesting that Balarama's was involved in the interstate distribution of misbranded drugs. The affidavit demonstrates that Balarama's' main operating location was 650 South Bridge Street, Visalia, California, and that its inventory of products was stored there. It was thus quite reasonable to seek the drugs and other evidence of § 331 violations at Balarama's 650 South Bridge Street facility.

Evidence presented in the affidavit indicates that NESCCO was an alter ego of Balarama's and participated in the shipping of drugs to Agent Piekarski and other buyers. Balarama's originally used a storage warehouse on South Lovers Lane in addition to the main plant on South Bridge Street, but subsequently vacated those premises. A vehicle used to move the goods out of the warehouse was seen stopping at 727 East Douglas.

Agent Anderson discovered that storage spaces 8 and 49 at 727 East Douglas were leased in the name of NESCCO, with the lessee giving 650 Bridge Street as its address and a telephone number that matched that of Balarama's. Two persons authorized to enter the storage units were employees of Balarama's. Apparently, Balarama's had moved their goods out of the South Lovers Lane warehouse and into storage spaces 8 and 49 at 727 East Douglas. It was thus reasonable to seek the drugs and other evidence of § 331 violations at those storage spaces.

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[10] It appears that the inspection was not authorized because Anderson did not present his credentials and notice of inspection to the lessee of the storage spaces, NESCCO, but only to the manager of the lessor, Rent-A-Space. Although 21 U.S.C. § 374 does not clearly indicate which party in a lessor-lessee situation must be presented with the credentials and notice, logic suggests that it is the lessee, as it is his privacy which is being invaded. *Cf. Stoner v. California,* 376 U.S. 483, 489, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1964) (only hotel guest or his authorized agent, not hotel owner or his agent, may consent to search of guest's room). There is no indication that NESCCO authorized Rent-A-Space to permit the FDA to inspect its leased storage spaces.

(3) Did the Search Warrants Describe the Items to be Seized with Sufficient Particularity?

A warrant must only be "reasonably specific, rather than elaborately detailed, in its description of the objects of the search." *United States v. Brock,* 667 F.2d 1311, 1322 (9th Cir.1982), *cert. denied,* 460 U.S. 1022, 103 S.Ct. 1271, 75 L.Ed.2d 493 (1983). Because there is no indication that Anderson's affidavit was attached to or otherwise accompanied the search warrants, we cannot look to it to provide particularity. *In the Matter of Seizure of Property Belonging to Talk of the Town Bookstore, Inc.,* 644 F.2d 1317, 1318-19 (9th Cir.1981).

Items 1-14 in the search warrants consist of fourteen different items which might be drugs identified by the names given in a Balarama's catalog sent to Agent Piekarski.[11] Such descriptions are obviously sufficiently particularized. Our real concern centers on item 15, which includes all other drugs, labels for drugs, orders and checks for drugs, records and correspondence relating to purchases, sales, packing and distribution of drugs; and other fruits and instrumentalities of crimes *which are evidence of violation of, or in violation of, 21 U.S.C. § 331(a) and (k).*

A review of Ninth Circuit cases indicates that the question of whether item 15 is sufficiently particularized is a close one. The description includes practically all paperwork (records, orders, checks, correspondence) relating to drugs, all drugs and labels for drugs, and other "fruits and instrumentalities of crimes," the only explicit limitation being that the material be evidence of a violation of 21 U.S.C. § 331(a) and (k). We have stated that " 'limiting' the search to only records that are evidence of the violation of a certain statute is generally not enough." *United*

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[11] Each of items 1-14 read, "Powder, crystalline, or other material identified as" followed by one of these names: Base-O-Scents (Base-O-Caine), Bolivian Rock, Close Enough, De Blanco, Peruvian Flake, Pseudo Scents (Pseudo-caine), Real Scents (Real Caine), Rock Crystal, Super Flake, Superior B, Super Scents (Super-caine), Supertoot, Toot Scents (Toot), and Ultra Scents (Ultra-Caine).

Although item 12, "Supertoot," was not listed in the catalog, Piekarski had placed a telephone order for Suptetoot with Balarama's.

States v. Cardwell, 680 F.2d 75, 78 (9th Cir.1982). *Cardwell* noted that where a statute provides the only limitation on a search, the executing officers are forced to interpret the statute in limiting their search, a task they may be unqualified to perform. *id.* Instead, "the warrant must contain some guidelines to aid the determination of what may or may not be seized." *id.* Item 15 does not provide any guideline at all.

Other than the statutory limitation, the only express limit on the scope of the search is that the seized material have some connection with drugs. This is obviously not a significant limitation because the statute itself already encompasses that limitation. *See* 21 U.S.C. § 352.

The government tries to distinguish *Cardwell* by noting that the statute involved in *Cardwell* was the very general tax evasion statute, 26 U.S.C. § 7201, which makes it a crime for a person to willfully attempt to evade any tax imposed by Title 26. Here the limiting statute is 21 U.S.C. § 331(a) & (k), concerning the misbranding of items involved in interstate commerce. The government contends that because this statute is more specific than the tax evasion statute it provides sufficient particularity. This claim must be rejected.

We have held that statutes at least as specific as the misbranding statutes did not sufficiently limit the scope of a search warrant. In *United States v. Crozier,* 674 F.2d 1293, 1299 (9th Cir.1982), *vacated on other grounds,* ____ U.S. ____, 104 S.Ct. 3575, 82 L.Ed.2d 873 (1984), for example, we held that a warrant which authorized the seizure of "material evidence of violation of 21 U.S.C. § 841," which prohibits the manufacture and possession of amphetamine with intent to distribute, was not sufficiently particularized. *See also United States v. Whitten,* 706 F.2d 1000, 1014 (9th Cir.1983) (warrant authorizing search for "evidence of narcotics trafficking" is overbroad), *cert. denied,* 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984).

Nevertheless, had the government limited the description in item 15 description to include labeling and other paperwork *relating only to those drugs listed in items 1-14,* the warrant would unquestionably have been sufficiently particularized. *Cf. Andresen*

v. Maryland, 427 U.S. 463, 480-82, 96 S.Ct. 2737, 2748-49, 49 L.Ed.2d 627 (1976) (warrant description limiting search to evidence of crime *involving particular lot* is sufficiently particularized); *Cardwell,* 680 F.2d at 77 (distinguishing *Andresen*). But item 15 did not impose such a limitation because it was meant to cover other drugs (and labeling and paperwork relating to them) not mentioned in items 1-14. Thus, some guidelines were needed to assist the officers in distinguishing other appropriate drugs from irrelevant material. As already noted, the statutory limitation by itself was not a sufficient guideline.

On the other hand, item 15 cannot be read in a vacuum and must instead be construed in light of the presence of items 1-14. Because items 1-14 provide a sample of names of suspected misbranded drugs, we believe that they implicitly limited item 15's otherwise unbounded reference to all other drugs (and labeling and paperwork relating to drugs) to only those drugs with names of the same nature as those identified in items 1-14. The names of the drugs given in items 1-14 aided the executing officers in determining whether any particular drug material (or paperwork relating to drugs) they came upon was similar to items 1-14 and thus was likely to be similarly misbranded.

Therefore, the listing of items 1-14 in the warrant provided an important guideline limiting the otherwise overbroad item 15 description. It is true that this limitation is not a very precise one, as the officers still had to decide whether any particular chemical or commercial name was of the same nature as those given in items 1-14. It is doubtful, however, that a much more precise description could have been given.

In *Cardwell,* we stated that "[o]ne of the crucial factors to be considered is the information available to the government. '[G]eneric classification in a warrant are acceptable only when a more precise description is not possible.' " *Cardwell,* 680 F.2d at 78 (quoting *United States v. Bright,* 630 F.2d 804, 812 (5th Cir.1980)); *see also VonderAhe v. Howland,* 508 F.2d 364, 369-70 (9th Cir.1974). The *Cardwell* decision was based in part on the fact that, prior to its warrant request, the government had known exactly what it needed and where the records were located. There was thus no necessity for the warrant's broad wording

which effectively allowed a re-examination of all of Cardwell's accounting records. *Cardwell*, 680 F.2d at 78; *see also United States v. Gomez-Soto*, 723 F.2d 649, 654 (9th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2360, 80 L.Ed.2d 831 (1984).

In our case, however, to the extent that the government sought evidence of misbranding involving drugs not listed in items 1-14, with a few minor exceptions, the government did not have information allowing it to specify the precise names of other potentially misbranded drugs. Thus, other than the listing of the drug names provided in items 1-14, it is not clear how the warrant could have provided any additional guidance to help the officers determine whether a particular material was a "drug" and was likely misbranded.

Considering the information provided in the affidavits, it appears that a list of the chemical names and street-slang terminology often associated with cocaine or cocaine substitutes would have given the best possible guidance. Anderson's affidavit discussed the cocaine-related chemicals (idocaine, procaine, etc.) and the cocaine street-slang terminology. Because the affidavit did not accompany the warrant, however, we cannot rely upon it. *See Talk of the Town Bookstore, supra*. Nevertheless, we hold that the presence of items 1-14 in the warrant provided essentially the same information by giving examples of relevant chemical names and street-slang terminology.

Although admittedly a close question, we conclude that item 15, viewed in the context of the rest of the warrant, was sufficiently particularized. The district court's decision upholding the validity of the search warrants and denying appellants' motion for return of property is AFFIRMED.

Appendix B

Search Warrant on Written Affidavit

84-2306

[Filed Nov. 20, 1981]

United States District Court
Eastern District of California

United States of America

v.

Two storage spaces in nine (9) one story cement block building enclosed by fence and wall on the southwest corner of the intersection of Douglas Avenue and Burke Avenue with address of 727 E. Douglas, Visalia, California, and comprise the facilities of Rent-A-Space. Entry to the facilities is by driveway between the building housing the office and a warehouse building on the south side of Douglas Avenue. The office is located to the east of the entry driveway. There is an exit gate near the southeast corner of the facility which opens onto Burke Avenue. The nine buildings contain individual storage lockers which are numerically identified. Some buildings have single rows of lockers that go from front to the back of the building and others have small opposing lockers on either side of the buildings with a solid wall in between. The entrance to the lockers is thru metal overhead doors. The storage space designated number 8 is located near the middle, north side of the storage building in the extreme southeast corner of the facility and is identified by the number "8" on the door. The locker designated as 49 is located in the middle south side of a warehouse building near the southwest corner of the facility and is identified by the number "49" on the door.

Affidavit having been made before me by the below-named affiant that he has reason to believe that on the premises known as

Two storage spaces in nine (9) one story cement block buildings enclosed by fence and wall on the southwest corner of the intersection of Douglas Avenue and Burke Avenue with address of 727 E. Douglas, Visalia, California, and comprise the facilities of Rent-A-Space. Entry to the facilities is by driveway between

the building housing the office and a warehouse building on the south side of Douglas Avenue. The office is located to the east of the entry driveway. There is an exit gate near the southeast corner of the facility which opens onto Burke Avenue. The nine buildings contain individual storage lockers which are numerically identified. Some buildings have single rows of lockers that go from front to the back of the building and others have small opposing lockers on either side of the buildings with a solid wall in between. The entrance to the lockers is thru metal overhead doors. The storage space designated number 8 is located near the middle, north side of the storage building in the extreme southeast corner of the facility and is identified by the number "8" on the door. The locker designated as 49 is located in the middle south side of a warehouse building near the southwest corner of the facility and is identified by the number "49" on the door.

In the Eastern District of California there is now being concealed certain property, namely

(1) Powder, crystalline, or other material identified as Base-O-Scents (Base-O-Caine)

(2) Powder, crystalline, or other material identified as Bolivian Rock

(3) Powder, crystalline, or other material identified as Close Enough

(4) Powder, crystalline, or other material identified as De Blanco

(5) Powder, crystalline, or other material identified as Peruvian Flake

(6) Powder, crystalline, or other material identified as Pseudo Scents (Pseudocaine)

(7) Powder, crystalline, or other material identified as Real Scents (Real Caine)

(8) Powder, crystalline, or other material identified as Rock Crystal

(9) Powder, crystalline, or other material identified as Super Flake

(10) Powder, crystalline, or other material identified as Superior B

(11) Powder, crystalline, or other material identified as Super Scents (Supercaine)

(12) Powder, crystalline, or other material identified as Supertoot

(13) Powder, crystalline, or other material identified as Toot Scents (Toot)

(14) Powder, crystalline, or other material identified as Ultra Scents (Ultra-Caine)

(15) All other articles of drug (which include components of drugs); labeling for drugs; orders for drugs received in the mail and any checks or money orders contained therein; records of orders for drugs received by telephone; receiving and shipping records for drugs and drug materials; all other records, including telephone records and computerized records, which may reflect the purchasing, ordering, sale, repacking, distribution, or other disposition of drugs; checks from U.P.S. for C.O.D. shipments of drugs; personal or business correspondence relating to the purchasing, ordering, sale, repacking, distribution, or other disposition of drugs; and other fruits and instrumentalities of crimes which are evidence of violations of, or in violation of, 21 U.S.C. 331(a) and (k).

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above-described and the grounds for application for issuance of the search warrant exist as stated in the supporting affidavit.

YOU ARE HEREBY COMMANDED to search on or before (not to exceed 10 days) the person or place named above for the property specified, serving this warrant and making the search (in the daytime—6:00 A.M. to 10:00 P.M.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant to A. D. Christensen, as required by law.

/s/ A. D. CHRISTENSEN
U. S. Magistrate

Dated Nov. 6, 1984
Time 4:31 p.m.

Search Warrant on Written Affidavit

84-2307

[Filed Nov. 20, 1984]

United States District Court
Eastern District of California

United States of America

v.

A one story building with metal siding and roof on the east side of Bridge Street, with the address of 650 South Bridge Street, Visalia, California, with office space in the northwest corner of the building occupied by Balarama's Enterprises, Inc. In the southwest corner of the same building are the facilities of the Visalia Cycle Center. Immediately to the north and across a parking lot area of the building occupied by the Tulare County Education Center. Immediately to the south and separated by a parking lot and a chain link fence is the building occupied by the Bayley Corporation.

Affidavit having been made before me by the below-named affiant that he has reason to believe that on the premises known as

A one story metal building with metal siding and roof on the east side of Bridge Street with address of 650 South Bridge Street, Visalia, California, with office space located in the northwest corner of the building occupied by Balarama's Enterprises, Inc. In the southwest corner of the same building are the facilities of the Visalia Cycle Center. Immediately next door and across a parking area to the north is located the Tulare County Education Center building. Immediately to the south and separated by a parking area and a chain link fence is the building occupied by the Bayley Corporation.

In the Eastern District of California there is now being concealed certain property, namely

(1) Powder, crystalline, or other material identified as Base-O-Scents (Base-O-Caine)

(2) Powder, crystalline, or other material identified as Bolivian Rock

(3) Powder, crystalline, or other material identified as Close Enough

(4) Powder, crystalline, or other material identified as De Blanco

(5) Powder, crystalline, or other material identified as Peruvian Flake

(6) Powder, crystalline, or other material identified as Pseudo Scents (Pseudocaine)

(7) Powder, crystalline, or other material identified as Real Scents (Real Caine)

(8) Powder, crystalline, or other material identified as Rock Crystal

(9) Powder, crystalline, or other material identified as Super Flake

(10) Powder, crystalline, or other material identified as Superior B

(11) Powder, crystalline, or other material identified as Super Scents (Supercaine)

(12) Powder, crystalline, or other material identified as Supertoot

(13) Powder, crystalline, or other material identified as Toot Scents (Toot)

(14) Powder, crystalline, or other material identified as Ultra Scents (Ultra-Caine)

(15) All other articles of drug (which include components of drugs); labeling for drugs; orders for drugs received in the mail and any checks or money orders contained therein; records of orders for drugs received by telephone; receiving and shipping records for drugs and drug materials; all other records, including telephone records and computer records, which may reflect the purchasing, ordering, sale,

repacking, distribution or other disposition of drugs; checks from U.P.S. for C.O.D. shipments of drugs; personal or business correspondence relating to the purchasing, ordering, sale, repacking, distribution, or other disposition of drugs; and other fruits and instrumentalities of crimes which are evidence of violation of, or in violation of, 21 U.S.C. 331(a) and (k).

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above-described and the grounds for application for issuance of the search warrant exist as stated in the supporting affidavit,

YOU ARE HEREBY COMMANDED to search on or before (not to exceed 10 days) the person or place named above for the property specified, serving this warrant and making the search (in the daytime—6:00 A.M. to 10:00 P.M.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant to A. D. Christensen as required by law.

/s/ A. D. CHRISTENSEN
U. S. Magistrate

Dated Nov. 6, 1984
Time 4:31 p.m.

No. 86-883

Supreme Court, U.S.
FILED
DEC 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

NESCCO, INC.,
Petitioner and Real Party in Interest,
for and on behalf of Storage Spaces
Designated Nos. "8" and "49"
Located at 277 Douglas, Visalia, California,
Defendant (C.A. No. 85-1085),

v.

UNITED STATES OF AMERICA,
Respondent and Plaintiff.

BALARAMA'S ENTERPRISES, INC.,
Petitioner and Real Party in Interest,
for and on behalf of 560 South Bridge Street,
Visalia, California, Defendant (C.A. No. 85-1086),

v.

UNITED STATES OF AMERICA,
Respondent and Plaintiff.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAY W. POWELL
POWELL & MACGLASHAN
1624 South Court Street
Visalia, California 93277
(209) 625-4343

Of Counsel:
DAVID F. RODRIGUEZ
ISHAM, LYNCH & RODRIGUEZ
3120 West Main Street,
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Visalia, California 93291-5728
(209) 733-2257
Counsel for Petitioners

November 24, 1986

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864 2300

16 pp

Appendix C

United States District Court
Eastern District of California

Mag. Docket No. 84-2306

United States of America,
Plaintiff,

v.

Storage Spaces Designated Nos. 8 and 49,
727 East Douglas, Visalia, California,
Defendants.

Mag. Docket No. 84-2307

United States of America,
Plaintiff,

v.

650 South Bridge Street,
Visalia, California,
Defendant.

Order
[Filed March 11, 1985]

On December 6, 1984, petitioner's motion for return of property and to suppress evidence was heard before the Honorable Robert E. Coyle, United States District Court for the Eastern District of California. David Rodriguez, Esq. appeared on behalf of petitioners Balarama Enterprises, Inc. and Nesco, Inc., the real parties in interest in regard to the above-described properties. Edward Moffat, Esq. was present as the representative of the United States. Argument was had and additional points and authorities submitted by petitioners. After full consideration of the papers filed and arguments presented by the parties, the court has reached the following conclusions.

No criminal charges have been filed against the real parties in interest in this case. It is therefore improper at this time to consider petitioners' motion as one to suppress evidence under Fed. R. Crim. Pro. 41(e). The motion must be treated as a civil action seeking to recover personalty and enjoin the unlawful use

thereof. *Weldon v. United States*, 196 F.2d 874 (9th Cir. 1952); *accord, Offices of Lakeside Non-Ferrous Metals v. United States*, 679 F.2d 778, 779 (9th Cir. 1982).

In the case at hand, the government has already returned to petitioners all the original business records seized from the premises located at 727 E. Douglas and 650 S. Bridge Street, Visalia, California. Those items remaining in the government's possession, listed as Exhibit A attached, were lawfully seized pursuant to a valid warrant and may therefore be utilized by the government in any subsequent administrative or criminal proceeding.

The affidavit executed by the United States Food and Drug Administration agent Robert J. Anderson provides information sufficient to establish probable cause to believe that 21 U.S.C. §§ 331(a) and (k) had been violated at the locations in question. In the affidavit offered in support of the application for a search warrant, agent Anderson related in detail his lengthy investigation of activities at and related to the premises described above, which included the purchase of misbranded and mislabeled products from petitioner Balarama Enterprises, Inc. and an account of the irregularities personally observed by the affiant during a lawful administrative inspection of petitioners' packaging facility, located at 650 S. Bridge Street in Visalia. In addition, the affiant obtained the consent of the owner of the storage units located at 727 E. Douglas to search the units leased to petitioners, and upon his lawful entry therein observed misbranded and mislabeled items of the type later listed in the affidavit and seized from those units. All of this information was incorporated by reference into the application for a search warrant and presented to a neutral magistrate. Finding probable cause to search the premises, the magistrate properly issued a warrant to search for and seize items identical to those purchased by the FDA agents, those lawfully observed by affiant, and generic items for which objective articulable standards were provided. *See United States v. Hillyard*, 677 F.2d 1336, 1339-40 (9th Cir. 1982). The numerous items found on the premises, whether specifically identified in the warrant or clearly falling within the generic category articulated in section 15 of that document, were properly seized. *See United States v.*

Offices Known as 50 State Distributing Co., 708 F.2d 1371, 1374 (9th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1272 (1983).

Therefore, petitioners' motion for the return of property seized by the United States is hereby denied.

IT IS SO ORDERED.

DATED: March 11th, 1985.

/s/ ROBERT E. COYLE
Robert E. Coyle
United States District Judge

EXHIBIT "A"

Inventory of Items Seized from Storage Units Nos. 8 and 49

Peruvian Flake	15/24/⅛ oz. bottles 285/⅛ oz. bottles 66/¼ oz. bottles 360/½ oz. bottles 56/1 oz. bottles 1,611/1 gm. bottles
Quinine Hydrochloride N.F.	7/25 kg. drugs—imported
Lidocaine Hydrochloride...	5/50 kg. drums—no label
Roxanthin Red 10	1/50 kg. drum
Unlabeled White Powder ..	1/50 kg. drum
Quinine Hydrochloride	1/25 kg. drum—H. Reisman
Toot-The Heavenly Incense	14 boxes/24/1 doz./2.75 gm. 22/1 doz./2.75 gm. +3/2.75 gm.
Super Toot	7/12/1 oz. bottles 12/1 oz. bottles 16/12/½ oz. bottles 3/1.5 gm. bottles
Summa Cense	1/48/1 oz. bottles
Base-O-Scent	722/1 gm. bottles 84/¼ oz. bottles ⅛ oz. bottles 3/1 lb. bottles
Nesco Procaine HCl	12/8 oz. bottles 84/4 oz. bottles
Unlabeled White Powder (est. ½ oz. bottles)	47/12/X oz.
Nesco Lidocaine HCl	18/4 oz. bottles
Ultra Scent	13/1 lb. bottles
Technicians Quinine HCl	117/12/1 oz. bottles 2/12/8 oz. bottles ⅛ oz. bottle ¼ oz. bottle 11/1 lb. bottles 4/1 oz. bottles
Bolivian Rock (on cards) ..	446/1 gm. bottles 526/¼ gm. bottles 64/½ gm. bottles 1336/⅛ gm. bottles 50/X oz. (no weight) bottles

Ephedrine Sulfate (no labels on bottles) 20/4 oz.
(note in box states Eph. Sul.)

Super Caine	210/1 gm. bottles 85/¼ oz. bottles 17/½ oz. bottles 305/⅛ oz. bottles
Technicians Benzocaine USP	12/12/4 oz. bottles 50/8 oz. bottles
Summa Caine	89/2 gm. bottles 90/6 gm. bottles
De Blanco.....	36/1 oz. bottles 94/5 gm. bottles + 74/½ oz. bottles
White Flame	12/8 oz. unlabeled bottles 22/1 oz. bottles 18/5 gm. bottles 15/X oz. no weight bottles 1/1.5 gm. bottles
Milky Trails	10/1 lb. bottles 16/1 gm. bottles 24/1 oz. bottles 20 bottles no weight
Base-O-Caine.....	242/½ oz. bottles 141/1 oz. bottles 69/¼ oz. bottles 317/⅛ oz. bottles 645/1 gm. bottles 600/X gm. bottles (no weight) 100 bottles (no weight)
Pseudo Scent	111/1.5 oz. bottles 125/1 oz. bottles 36/5 oz. bottles 106/X oz. (no weight) bottles
Rock Crystal Ultra Caine..	228/¼ oz. bottles 51/12/½ oz. bottles 240/½ oz. bottles 72/⅛ oz. bottles 309/25 gm. bottles 340/1 gm. bottles
Super Scent Rock Incense	24/1 oz. bottles
Rock Crystal Ultra Scent..	528/1 oz. bottles 12/1 gm. bottles 972/⅛ oz. bottles 27/¼ oz. bottles 7/6/½ oz. bottles
Alchemist Benzocaine USP	23/2 oz. bottles
Real Caine	56/2 oz. bottles
Super Scent	104/½ oz. bottles

Unlabeled White Crystal Powder	37/X oz. bottles (no weight) 578/1.5 oz. bottles (no weight)
Close Enough.....	34/1 oz. bottles
Super Flake	13/¼ oz. bottles
Real Scent	2 plastic tubs (est. 5l bs.) 22/7 oz. bottles 3/1¼ oz. bottles
Unlabeled White Crystal Powder	110/X oz. (no weight) bottles 1/X oz. (no weight) bottles 228/1.5 gm. bottles
Pseudo Caine	38/1.5 oz. bottles
Ps. Eph. Sul. (white powder thought to be Pseudophedrine Sulfate)	Est. 10 lbs.
Eph. HCl (white powder thought to be Ephedrine HCl)	Est. 5 lbs.
Unlabeled bottles White Powder	7/½ oz. (one labeled Benzocaine)
1 sack	1/½ oz. bottles Super Scent 8/⅛ oz. bottles Rock Crystal Ultra Scent 2/¼ oz. bottles Rock Crystal Ultra Scent 2/½ oz. bottles Rock Crystal Ultra Scent ¼ oz. bottles Technicians Benzocaine USP 2/1 oz. bottles Peruvian Flake 1/1 oz. bottle Rock Crystal Ultra Scent 1/1 oz. bottle Close Enough 1/¼ oz. bottle Base-O-Caine 2/¼ oz. bottles Super Caine 2/½ oz. bottles Super Caine 5/⅛ oz. bottles Bolivian Rock 4/¼ oz. bottles Base-O-Scent 6/¼ oz. bottles Peruvian Flake 2 sm. gm. vials—no label
1 carton.....	2 unlabeled bottles white powder—3 oz. 1/1000 capsule bottles Super Diet Aid 1/100 capsule bottles Pseudo-Plus 2/202 bottles Perfect Cense 1/6 oz. bottles Perfect Cense 7/5 gm. bottles Sintho Caine

4 hot boxes

68 carved drug boxes (pocket Sized)

1 carton of label rolls as follows: .....
White Flame 1 oz.
White Flame 5 gm.
White Flame 8 oz.
White Flame 1.5 gm.
Pseudo Scent 1 oz.
Pseudo Scent 5 gm.
Pseudo Scent 1.5 gm.
Close Enough 1 oz.

1 carton of labels as follows:
1 roll Blank Nescco labels
1 roll Nescco Procaine HC1 USP ½ oz.
1 roll Nescco Procaine HC1 USP 8 oz.
1 + roll Nescco Procaine HC1 USP 4 oz.
5 rolls Nescco Lidocaine HC1 ½ oz.
5 rolls Nescco Lidocaine HC1 4 oz.
2 rolls Nescco Lidocaine HC1 8 oz.
1 + rolls Nescco Lidocaine HC1 1 lb.
1 roll Nescco Lidocaine HC1 ½ oz.
2 rolls Procaine HC1 1 oz.

Inventory of Items Seized from 650 S. Bridge Street

3 rolls of labels: .....
Caffeine Anhydrous
Caffeine Anhydrous
Quinine HCL

Technicians Caffeine Anhydrous .....
12/1 oz. bottles

1 carton containing: .....
1/1 gm. vial Peruvian Flake
1/½ oz. bottle Vitamin B Complex
1/1 oz. bottle Technicians Crystallized Mannitol
12 hand held balance scales
2 boxes cigarette papers

1 carton containing: .....
18/.40 oz. Rush
1/12/1 oz. Sparkling Beauty Mannitol
1/12/½ oz. Sparkling Beauty Mannitol
1/500 gm. Star Label Lactose
1/500 gm. Mallinckrodt Lactose
1 small bottle Trugger Chemical Co. Mannitol

1 carton containing: .....
27/5 gm. White Flame
1/½ oz. Peruvian Flake
1/⅛ oz. Rock Crystal Ultra Caine
1/½ oz. Super Flake

Appendix D

David F. Rodriguez
Isham, Macias, Lynch, Cronin & Rodriguez
3120 West Main Street, Suite A
Visalia, California 93291-5728
Telephone: (209) 733-2257

Attorneys for Appellants and
Real Parties in Interest

In the United States Court of Appeals
For The Ninth Circuit

C.A. No. 85-1085
Mag. Dkt. No. 84-2306 (REC)

United States of America,
Plaintiff/Appellee,

vs.

Storage Spaces Designated No. "8" and "49" Located at
727 East Douglas, Visalia, California,
Real Party in Interest/Appellant.

C.A. No. 85-1086
Mag. Dkt. No. 84-2307 (REC)

United States of America,
Plaintiff/Appellee,

vs.

650 South Bridge Street, Visalia, California,
Defendant,
and
Balarama's Enterprises, Inc.,
Real Party in Interest/Appellant.

Motion for Late Filing of Petition for Rehearing and
Suggestion for Rehearing En Banc

Appellants and real parties in interest, by and through their undersigned counsel, hereby move for an Order permitting the late filing of appellants' Petition for Rehearing and Suggestion for

Rehearing En Banc. This motion is made pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure and Rule 13(d) of the Rules of the United States Court of Appeals for the Ninth Circuit, and the attached Declaration of David F. Rodriguez, counsel for appellants.

Dated: December 26, 1985.

ISHAM, MACIAS, LYNCH,
CRONIN & RODRIGUEZ

By /s/ DAVID F. RODRIGUEZ
David F. Rodriguez
Attorneys for Appellants and
Real Parties in Interest

DECLARATION OF DAVID F. RODRIGUEZ

I, DAVID F. RODRIGUEZ, declare:

1. That I am an attorney at law licensed to practice in all courts of the State of California, and also in the United States Court of Appeal for the Ninth Circuit, and I am co-counsel for appellants and real parties in interest;

2. That the Opinion of the panel was rendered on December 3, 1985;

3. That the panel's Opinion was served by mail and received by counsel for appellants and real parties in interest on December 9, 1985;

4. That in accordance with Rule 40(a) and Rule 26(c) of the Federal Rules of Appellate Procedure, I calculated the due date for a Petition for Rehearing and a Suggestion for Rehearing En Banc as being December 20, 1985;

5. That upon receipt of the Opinion of the Court on December 9, 1985, I began a diligent effort to prepare the Petition for Rehearing and Suggestion for Rehearing En Banc, while also being assigned to handle a number of other matters pending on other cases I am responsible for;

6. That due to a number of revisions of the Petition for Rehearing and Suggestion for Rehearing En Banc to comply with Rule 40 of the Federal Rules of Appellate Procedure, the completion of the Petition for Rehearing and Suggestion for Rehearing En Banc was not concluded until December 20, 1985;

7. That on the morning of December 20, 1985, a courier was obtained in order to take the Petition and suggestion to San Francisco for filing on December 20;

8. That on the morning of December 20, 1985, I called the Clerk for the Ninth Circuit assigned to the Eastern District of California and inquired whether mailing of the Petition and Suggestion on December 20 would constitute timely filing thereof, and I was advised that mailing on the date of December 20, 1985 would be sufficient;

9. That I then made efforts to insure that the package containing the original and requisite number of copies for a Petition for Rehearing and Suggestion for Rehearing En Banc was mailed by December 20;

10. That pursuant to Rule 26(c) of the Federal Rules of Appellate Procedure, which provides that three days shall be added to the prescribed period after service of a papaer by mail, I added three days to the 14 days for filing a Petition for Rehearing or Suggestion for Rehearing En Banc as provided in Rule 40 of the Federal Rules of Appellate Procedure, making the due date for filing December 20 rather than December 17;

11. That on the morning of December 26, 1985, I was advised by a deputy clerk of the Court that the Petition for Rehearing and Suggestion for Rehearing En Banc was received three (3) days late, which prompted this instant motion for late filing of appellants' Petition for Rehearing and Suggestion for Rehearing En Banc;

12. That upon being advised of the necessity for the instant motion, I attempted to contact Assistant United States Attorney Edward P. Moffat, counsel for appellee, United States of America. I was advised, however, that Mr. Moffat is on annual leave for Christmas week and was out of town and unavailable;

13. That had I been able to reach Mr. Moffat, I do not believe he would have any objection to appellants' motion for late filing of their Petition for Rehearing or Suggestion for Rehearing En Banc;

14. That had I known of the actual date being December 17, 1985, I would have, pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure and Rule 13(d) of the Rules of the United States Court of Appeal for the Ninth Circuit, applied for an order extending time in which to file appellants' Petition for Rehearing and Suggestion for Rehearing En Banc;

15. That from the date of receipt of the panel's Opinion, being December 9, 1985, appellants filed their Petition for Rehearing and Suggestion for Rehearing En Banc 11 days thereafter; and

16. That the Petition for Rehearing and Suggestion for Rehearing En Banc has been filed by appellants and real parties in interest on the good faith belief that consideration by the full Court is necessary to secure and maintain uniformity of its decisions with regard to the standard of particularity in a search warrant and because such standard of particularity involves a question of exceptional importance.

WHEREFORE, I pray that an Order be issued permitting the late filing of appellants' and real parties in interest's Petition for Rehearing and Suggestion for Rehearing En Banc which was received and lodged with the Court three days late.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 26th day of December 1985 at Visalia, California.

/s/ DAVID F. RODRIGUEZ
David F. Rodriguez

Appendix E

United States Court of Appeals
For the Ninth Circuit

No. 85-1085
Eastern California

United States of America,
Plaintiff-Appellee,

vs.

Storage Spaces Designated Nos. "8" and "49"
Located at 277 East Douglas, Visalia, Calif.,
Defendant,

and

NESCCO, Inc.,
Real Party in Interest-Appellant.

No. 85-1086

United States of America,
Plaintiff-Appellee,

vs.

560 South Bridge Street, Visalia, California,
Defendant,

and

Balarama's Enterprises, Inc.,
Real Party in Interest-Appellant.

Order
[Filed July 30, 1986]

Before: CHOY, HUG, and SCHROEDER, Circuit Judges.

Appellants' motion for late filing of a petition for rehearing and suggestion for rehearing en banc is granted.

The clerk shall file the petition for rehearing and suggestion for rehearing en banc, which was lodged on December 23, 1985.

Appendix F

United States Court of Appeals
For the Ninth Circuit

No. 85-1085
Eastern California

United States of America,
Plaintiff-Appellee,

vs.

Storage Spaces Designated Nos. "8" and "49"
Located at 277 East Douglas, Visalia, Calif.,
Defendant,

and

NESCCO, Inc.,
Real Party in Interest-Appellant.

No. 85-1086

United States of America,
Plaintiff-Appellee,

vs.

560 South Bridge Street, Visalia, California,
Defendant,

and

Balarama's Enterprises, Inc.,
Real Party in Interest-Appellant.

Order
[Filed August 27, 1986]

Before: CHOY, HUG, and SCHROEDER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-883

In the Supreme Court of the United States

OCTOBER TERM, 1986

NESCCO, INC., AND BALARAMA'S ENTERPRISES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

11pp

TABLE OF AUTHORITIES

Cases: Page

Andresen v. *Maryland*, 427 U.S. 463 (1976) 5, 6, 7, 9
Milliman v. *Minnesota*, 774 F.2d 247 (8th Cir. 1985) 9
United States v. *Abrams*, 615 F.2d 541 (1st Cir. 1980) 9
United States v. *Gomez-Soto*, 723 F.2d 649 (9th Cir.), cert. denied, 466 U.S. 977 (1984) 9
United States v. *Jacob*, 657 F.2d 49 (4th Cir. 1981), cert. denied, 455 U.S. 942 (1982) 9
United States v. *Johnson*, 690 F.2d 60 (3d Cir. 1982), cert. denied, 459 U.S. 1214 (1983) 9
United States v. *Pollock*, 726 F.2d 1456 (9th Cir. 1984) 8
United States v. *Roche*, 614 F.2d 6 (1st Cir. 1980) 9
United States v. *Wuagneux*, 683 F.2d 1343 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983) 9

Constitution and Statutes:

U.S. Const. Amend. IV 1, 6, 7, 8, 9
21 U.S.C. 331 5
21 U.S.C. 331(a) 1, 4
21 U.S.C. 331(k) 1, 4
21 U.S.C. 352(e)(1)(A)(ii) 2
21 U.S.C. 352(f)(1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-883

NESCCO, INC., AND BALARAMA'S ENTERPRISES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that a search warrant executed by the Food and Drug Administration (FDA) violated the Fourth Amendment's requirement of particularity.

1. This case arose out of the FDA's investigation of petitioners, who allegedly were manufacturing and marketing cocaine substitutes in violation of 21 U.S.C. 331(a) and (k). Section 331 prohibits the following acts:

> (a) The introduction or delivery for introduction into interstate commerce of any * * * drug * * * that is misbranded.
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> * * * * *
>
> (k) * * * the doing of any * * * act with respect to, a * * * drug * * *, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being * * * misbranded.

In the FDA's view, marketing cocaine substitutes without specifying the active ingredients of the substances (see 21 U.S.C. 352(e)(1)(A)(ii)), or without providing adequate directions for the use of the substances (see 21 U.S.C. 352(f)(1)), constitutes the misbranding of drugs, in violation of Section 331.

In 1983, the State of California enjoined petitioner Balarama's Enterprises, Inc., from manufacturing, packaging, marketing, selling, or distributing Benzocaine, Lidocaine, Tetracaine, and Procaine—anesthetic drugs often diverted to illegal use as cocaine substitutes (Pet. App. A5). The injunction had little practical effect, however, as the FDA learned when an employee of Balarama's, arrested for possession of cocaine, was found with roughly 2000 leaflets from Balarama's entitled "Cocaine." Each leaflet stated that the product advertised was a synthetic substitute for cocaine. *Id.* at A5-A6. The FDA obtained a copy of petitioner's catalogue, which listed many items for sale as incense with commercial names suggesting that the incense was to be used as a cocaine substitute. Some of the products even bore a label stating, "if ingested or inhaled, may cause stimulation." *Id.* at A6. An agent of the FDA placed orders with and

received from Balarama's some of these cocaine substitutes (*id.* at A8).

To further its investigation, the FDA in 1984 decided to search Balarama's principal place of business, as well as a warehouse leased in the name of NESCCO, which the FDA had learned operated as an alter ego of Balarama's (Pet. App. A9). Based on affidavits by an FDA inspector detailing the information the FDA possessed regarding Balarama's activities, the FDA obtained warrants to search both premises.[1] Items 1 through 14 in the search warrants listed 14 different drugs that were used as cocaine substitutes (see *id.* at A15-A16, A18-A19). Item 15 (*id.* at A16, A19-A20) provided for the seizure of:

> All other articles of drug (which include components of drugs); labeling for drugs; orders for drugs received in the mail and any checks or money orders contained therein; records of orders for drugs received by telephone; receiving and shipping records for drugs and drug materials; all other records, including telephone records and computerized records, which may reflect the purchasing, ordering, sale, repacking, distribution, or other disposition of drugs; checks from U.P.S. for C.O.D. shipments of drugs; personal or business correspondence relating to the purchasing, ordering, sale, repacking, distribution, or other disposition of drugs; and other fruits and instrumentalities of crimes which are evidence of violations of, or in violation of, 21 U.S.C. 331(a) and (k).

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[1] Petitioners have not challenged the court of appeals' determination that the FDA established probable cause for the search.

In executing the warrants at both premises, United States marshals seized a large quantity of substances that they believed were intended to be used as cocaine substitutes. The marshals also seized business records relating to transactions in those drugs. Pet. Supp. App. A22, A24-A27. The business records were subsequently returned (*id.* at A22). No criminal charges are currently pending against petitioners (*id.* at A21-A22).

b. On December 6, 1984, petitioners moved in district court for return of the seized property that the FDA had not already returned.[2] The district court denied the motion, holding that the FDA had established probable cause to believe that 21 U.S.C. 331(a) and (k) had been violated. The court concluded that the magistrate "properly issued a warrant to search for and seize items identical to those purchased by the FDA agents, those lawfully observed by affiant, and generic items for which objective articulable standards were provided. The numerous items found on the premises, whether specifically identified in the warrant or clearly falling within the generic category articulated in section 15 of that document, were properly seized." Pet. Supp. App. A22 (citation omitted).

The court of appeals affirmed, holding that the warrants were sufficiently particularized to meet constitutional standards. The court noted that items 1 through 14 "consist of fourteen different items which might be drugs identified by the names given in a Balarama's catalog sent to Agent Pierkarski. Such descriptions are obviously sufficiently particularized" (Pet. App. A10). The only remaining question was

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[2] The property retained by the FDA consisted of the drugs, cartons, and labels listed in Pet. Supp. App. A24-A27 (*id.* at A22).

whether item 15, which authorized the seizure of drugs, labels, business records, and "other fruits and instrumentalities of crimes which are evidence of violations of * * * 21 U.S.C. 331(a) and (k)," met the Fourth Amendment standard of particularity.

While the court commented that the question was a "close one" (Pet. App. A10), it held that the warrants as a whole satisfied the particularity requirement. The court initially noted that the statutory limitation in item 15, restricting the search to the fruits or instrumentalities of a violation of 21 U.S.C. 331, did not in and of itself provide a sufficient limitation. In the court's view, "where a statute provides the only limitation on a search, the executing officers are forced to interpret the statute in limiting their search, a task they may be unqualified to perform." Pet. App. at A11. The court held, however, that item 15 must be considered in the context of the framework set by items 1 through 14. Relying upon *Andresen* v. *Maryland*, 427 U.S. 463, 480-482 (1976), the court stated (*id.* at A12) that

> item 15 cannot be read in a vacuum and must instead be construed in light of the presence of items 1-14. Because items 1-14 provide a sample of names of suspected misbranded drugs, we believe that they implicitly limited item 15's otherwise unbounded reference to all other drugs (and labeling and paperwork relating to drugs) to only those drugs with names of the same nature as those identified in items 1-14.

The court further explained that the government could not have specified the precise names of all the drugs that were likely to be misbranded, since the government would have no way of knowing all the street names that could be used for the cocaine sub-

stitutes (Pet. App. A13). The court concluded, therefore, that the warrants as a whole provided sufficient guidelines for the officers serving the warrants and thus were consistent with constitutional standards.

2. Petitioners contend that the Ninth Circuit's "implied limitation" rule of particularity sanctions the use of general warrants and is thereby inconsistent with the Fourth Amendment. In addition, petitioners assert that the decision below creates a conflict among the circuits.

a. Far from articulating a "novel standard" (Pet. 7) or one that is "freshly coined" (Pet. 6), the court of appeals simply applied the approach used by this Court in *Andresen* v. *Maryland*, 427 U.S. 463 (1976). There, state law enforcement officials carried out an investigation of petitioner's real estate settlement activities. The officials procured search warrants for petitioner's offices, detailing various items to be seized in connection with petitioner's role in the conveyance of Lot 13T, a particular parcel in a real estate development project. While petitioner conceded that the warrants were for the most part "models of particularity" (427 U.S. at 479), he argued that they were rendered fatally general by the addition of the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." That phrase was included in the warrant at the end of a comprehensive list of items to be seized. As in this case, the defendant in *Andresen* argued that the final phrase should be read in isolation from the other parts of the warrants, and that standing apart the phrase would have permitted the seizure of items that were evidence of any conceivable crime. This Court rejected that argument. It held instead that the final phrase should be read in context with the full text of

the warrants, which authorized the search for and seizure of material relevant only to petitioner's activities in connection with Lot 13T. So construed, the Court held that the warrants comported with Fourth Amendment standards of particularity. 427 U.S. at 479-482.

The court of appeals in this case adopted a similar tack. The court construed item 15 in the warrants, which authorized the seizure of drugs, labels, and paperwork, to refer only to the types of drugs listed in items 1 through 14. Just as the language "together with other fruits, instrumentalities and evidence of crime at this [time] unknown" in *Andresen* was interpreted to be limited to evidence of the crime of false pretenses with respect to Lot 13T, so the search and seizure authorized in item 15 was limited to cocaine substitutes of the type listed in items 1 through 14, along with the components and labels for those drugs. The list of drugs in items 1 through 14 therefore provided the officers serving the warrants with sufficient guidelines to determine which items to seize.

The court of appeals properly noted that it would be unrealistic to hold the government to a standard of much greater precision. While the government was aware of many of the street names used for cocaine substitutes, the court found that government agents could not have foreseen all the names that petitioners might have given to the cocaine substitutes.[3]

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[3] Petitioners point out (Pet. 12) that the affidavits in support of the search warrants named and referred to 57 different product items while only 14 were listed in the warrants themselves. Yet petitioners do not contest that the 14 drugs listed were sufficient to apprise those serving the warrants of the type of drug to be seized. Nor do they dispute that it

Thus, items 1 through 14 were as precise as they could practically be, by providing a list of the most common "chemical names and street-slang terminology often associated with cocaine or cocaine substitutes" (Pet. App. A13). As the Ninth Circuit has previously observed, "[s]o long as officers can distinguish between legally and illegally possessed property on the basis of objective, articulated standards, a search warrant based on probable cause may direct inspection of premises containing a generic class of items, a portion of which are believed to be stolen or contraband." *United States* v. *Pollock*, 726 F. 2d 1456, 1466 (1984).[4]

In sum, the Ninth Circuit correctly construed this Court's decision in *Andresen* to hold that an otherwise overbroad authorization for a search is sufficiently particularized if, in the context of the entire warrant, there are reasonably objective standards to govern the executing officers' search. As applied in this case, the limitations contained in items 1 through 14, namely that the misbranded drugs be those intended to be used as cocaine substitutes, provided the requisite standards to satisfy the requirements of the Fourth Amendment.

b. Nor does the court's opinion, as petitioners suggest (Pet. 9), give rise to a split among the circuits.

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would have been impossible for the government to have prepared a comprehensive list of the wide variety of merchandising names used to identify different cocaine substitutes.

[4] Petitioners assert (Pet. 13) that the marshals seized items that were not similar to those enumerated in items 1 through 14. The warrants, however, also authorized the seizure of the "components of drugs" and "labeling for drugs," which would include, inter alia, cutting and packaging agents of the sort cited by petitioners. See Pet. Supp. App. A24-A27.

While petitioners are correct that some courts of appeals have held that limiting a search to items that are evidence of the violation of a certain statute is generally not specific enough, see, *e.g.*, *United States* v. *Gomez-Soto*, 723 F.2d 649 (9th Cir.), cert. denied, 466 U.S. 977 (1984); *United States* v. *Roche*, 614 F.2d 6 (1st Cir. 1980), the cases cited by petitioner do not hold that such searches violate the Fourth Amendment if the rest of the warrant in effect provides standards circumscribing the discretion of the searching officers. Indeed, the courts of appeals have agreed with the Ninth Circuit in applying *Andresen* so that "the 'general' tail of the search warrant will be construed so as not to defeat the 'particularity' of the main body of the warrant." *United States* v. *Abrams*, 615 F.2d 541, 547 (1st Cir. 1980). See also *Milliman* v. *Minnesota*, 774 F.2d 247, 250 (8th Cir. 1985) ("Of course whether a warrant fails the particularity requirement cannot be decided in a vacuum. The court will base its determination on such factors as the purpose for which the warrant was issued, the nature of the items to which it is directed, and the total circumstances surrounding the case.") (citation omitted); *United States* v. *Wuagneux*, 683 F.2d 1343, 1349-1351 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983); *United States* v. *Jacob*, 657 F.2d 49, 51-52 (4th Cir. 1981), cert. denied, 455 U.S. 942 (1982); *United States* v. *Johnson*, 690 F.2d 60, 64 (3d Cir. 1982), cert. denied, 459 U.S. 1214 (1983).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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